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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/699,187	11/01/2003	John Anthony Guido	UT09042003	3480

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EXAMINER	
MAHAFKEY, KELLY J	

ART UNIT	PAPER NUMBER
1794	

MAIL DATE	DELIVERY MODE
05/12/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/699,187	GUIDO, JOHN ANTHONY	
	Examiner	Art Unit	
	Kelly Mahafkey	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *25 September 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-3,5-10,12-15 and 17-20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-3,5-10,12-15 and 17-20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-3, 5, 6, and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Verhaeghe (US 2002/0170398 A1) in view of the combination of Cruess (Commercial Fruit and Vegetable Products, 3rd Edition, 1948) and Studer (US 4232506). The references and rejection are incorporated herein and as cited in the office action mailed August 3, 2007.

Claims 7, 12-15, and 17-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Verhaeghe (US 2002/0170398 A1) in view of the combination of Cruess (Commercial Fruit and Vegetable Products, 3rd Edition, 1948) and Studer (US 4232506), further in view of Sanders (US 3986561). The references and rejection are incorporated herein and as cited in the office action mailed August 3, 2007.

Response to Arguments

Applicant's arguments filed September 25, 2007 have been fully considered but they are not persuasive.

Applicant argues in the declaration that it would not be obvious to combine a shelf stable processing stream with a fresh cut processing stream to make two products within one facility. Applicant argues that the two products are traditionally processed at different times, are processed at different types of locations, have different shelf-lives, do not use common processing equipment, have different harvesting methods, and thus, it would not have been obvious to combine the fresh cut and shelf stable processing within one facility. Applicant's argument is not convincing as Verhaeghe teaches of a fresh cut processing stream in which the ends of the tomatoes are cut off as undesirable on the fresh product (paragraphs 0004, 0016, and 0019); Verhaeghe teaches that the undesirable sections can be utilized for further processing (paragraphs 0030 and 0035); Verhaeghe does not suggest how to further process the tomato ends;

Cruess teaches of using tomato waste products to make tomato puree, i.e. a shelf stable tomato product (page 437); it would have been obvious to use the tomato waste from the fresh cut process stream as taught by Verhaeghe to make the shelf stable tomato product as taught by Cruess; it would been further obvious to have both processes within the same facility in order to save on transportation costs and time, thus decreasing production overhead and time. To do so would have been common sense to one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims.

Applicant argues in the remarks that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, applicant argues that there is no motivation or supportable reasons to have two separate processing streams in one facility (Remarks pages 6-10). Applicant's argument is not convincing as Verhaeghe teaches of a fresh cut processing stream in which the ends of the tomatoes are cut off as undesirable in the fresh cut product (paragraphs 0004, 0016, and 0019); Verhaeghe teaches that the undesirable sections can be utilized for further processing (paragraphs 0030 and 0035); Verhaeghe does not suggest how to further process the tomato ends; Cruess teaches of using tomato waste products to make tomato puree, i.e. a shelf stable tomato product (page 437); it would have been obvious to use the tomato waste from the fresh cut process stream as taught by Verhaeghe to make the shelf stable

tomato product as taught by Cruess; it would been further obvious to have both processes within the same facility in order to save on transportation costs and time, thus decreasing production overhead and time. To do so would have been common sense to one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims.

In response to applicant's arguments against the references individually (Remarks pages 8-9), one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Applicant is further reminded that a rejection, which includes a reference which previously included in a different rejection is not overcome just because the previous rejection was overcome. A 103 rejection is based on a combination of references and not upon one reference alone. (See remarks Page 8, Verhaeghe.)

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., heat treating the product) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Remarks page 9, state, that "shelf stable processing requires the input into the process be heat treated (i.e., cooked)". There is nothing in the claims that requires heating. The recitation of "shelf stable" is defined as a product which is able to be stored at room temperature; the term "shelf stable" does not require heat treatment.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1794

/Kelly Mahafkey/
Examiner
Art Unit 1794